MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,

Petitioner,

v.

J. D. MONK, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*, OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-701

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ROADWAY EXPRESS, INC.,

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v.

J. D. MONK, et al.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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NAACP Legal Defense and Educational Fund, Inc. hereby moves for leave to file the attached brief as amicus curiae.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights, and other rights, by prosecuting and defending lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and other courts as well as filed briefs amicus curiae. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Los Angeles County v. Associated General Contractors of California, 438 U.S. 909 (1978).

The Legal Defense Fund believes that its experience in litigation concerning attorney's fees and employment discrimination may be of assistance to the Court in the present case. See, e.g., Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Albemarle Paper Company

v. Moody, 422 U.S. 405 (1975); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Accordingly, it requests permission to file the accompanying amicus curiae brief. Consent to the filing of the brief has been granted by counsel for respondents but has been refused by counsel for petitioner. The brief is submitted in support of respondents. It supports the arguments of respondents and the general analysis of the Court of Appeals below although the basis for its reasoning is different from that relied upon by respondents and the Court of Appeals. Because of this difference and the potentially adverse impact of improper application of 28 U.S.C. § 1927, and related provisions, upon the enforcement of civil rights statutes,*/ the movant submits that the brief should be accepted for filing by the Court.

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*/ See, e.g., Wheeler v. Anchor Continental, Inc., 20 FEP Cases 591 (D.S.C. 1978), appeal docketed, No. 79-1116 (4th Cir., Feb. 14, 1979); Plummer v. Chicago Journeyman Plumbers' Local Union No. 130, U.A., Civil No. 77 C 1726, Nov. 19, 1979 (N.D. Ill.); Flora v. Moore, 22 EPD ¶ 30,365 (N.D. Miss.), Dec. 8, 1979.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc. respectfully prays that this motion be granted and that the attached brief be filed.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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STATEMENT OF INTEREST

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation incorporated under the laws of the State of New York. It was

formed to assist black persons in securing their constitutional rights, and other rights, by prosecuting and defending lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and other courts as well as filed briefs amicus curiae. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Los Angeles County v. Associated General Contractors of California, 438 U.S. 909 (1978).

The Legal Defense Fund believes that its experience in litigation concerning attorney's fees and employment discrimination may be of assistance to the Court in the present case. See, e.g., Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Albemarle Paper Company v. Moody, 422 U.S. 405 (1975); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

SUMMARY OF ARGUMENT

The writ of certiorari should be dismissed as improvidently granted. Although this Court granted the writ for the sole purpose of determining the allowability of attorney's fees as excess costs under 28 U.S.C. § 1927, it is not possible to decide this issue in the present state of the record since both the Court of Appeals and the district court below erroneously assumed that § 1927 was applicable to the facts presented here. The record shows that the acts found by the court below to be unreasonable and vexatious were acts which were no more than failure to prosecute respondents' claims for relief. They were not acts which either multiplied the proceedings below or caused defendant to incur excess costs. Accordingly § 1927 is inapplicable.

The writ should also be dismissed as improvidently granted because of the nonfinal nature of the judgment by the Court of Appeals remanding the action to the district court to determine what, if any, excess costs were caused by respon-

dents' attorneys' unreasonable and vexatious acts or by any multiplication of the proceedings by them. If the district court, upon remand, concludes that no excess costs and no multiplication of proceedings were caused, then the granting of the writ of certiorari to determine the allowability of attorney's fees as excess costs under § 1927 will have been improvident.

If, in the alternative, the writ is not dismissed, then we submit that this Court should affirm in part and reverse in part. Insofar as the judgment remands the case to the district court for the purpose of determining whether excess costs were incurred by petitioner and whether excess cost resulted from respondents' attorneys' vexatious acts or alleged multiplication of the proceedings, the judgment, we submit, should be affirmed. To the extent, however, that the judgment rests on an assumption, in the absence of evidence, that respondent McPherson's failure to appear at his scheduled deposition was a multiplication of proceedings caused by respondents' attorneys, the judgment should reversed.

If the Court nonetheless decides to resolve the hypothetical issue in this case of whether attorney's fees can be assessed under § 1927, then, we submit, the Court should hold that attorney's fees are not items of costs within the meaning of § 1927. If the Court, however, holds that attorney's fees are allowable under § 1927, then we urge that it should hold further that their allowance as part of excess costs is discretionary and governed by standards normally applicable to an award of attorney's fees.

ARGUMENT

I. SECTION 1927 IS NOT APPLICABLE TO THE CONDUCT OF RESPONDENTS' ATTORNEYS

This Court granted petitioner's writ of certiorari for the limited purpose of determining whether attorney's fees are allowable as elements of excess costs under 28 U.S.C. § 1927. Necessarily, the Court assumed that this issue was presented by the record below and that § 1927 was applicable to the proceedings below. Because

this assumption is not consistent with the record, the petition for writ of certiorari should be dismissed as improvidently granted.

It is a guiding rule of this Court that it will neither render advisory opinions on hypothetical questions nor determine controversies which are not sufficiently definite and concrete to assure an immediate and definitive determination of the validity of conflicting claims presented by adverse parties.[1/] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937); United States v. Fruehauf, 365 U.S. 146, 157 (1961). Also see, Flast v. Cohen, 392 U.S 83, 92-101 (1968). Dismissal of the writ of certiorari as improvidently granted is proper therefore if necessary to effectuate this policy. The writ should also be dismissed as improvidently granted when "conditions originally thought to justify granting the writ of certiorari are not

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1/ The source of this policy is in Article III of the Constitution of the United States as well as in jurisprudential considerations. See Barrows v. Jackson, 346 U.S 249, 256-257 (1953); Flast v. Cohen, supra, 392 U.S at 92-101.

in fact present."[2/] Burrell v. McCray, 426 U.S 471, 473-74 (9176)(Brennan, J., dissenting). Both conditions exist here.

By the explicit terms of the statute, § 1927 is applicable only if the offending attorney has, in the course of litigation, (1) multiplied the proceedings, (2) increased the costs, (3) engaged in unreasonable and vexatious acts, and (4) caused excess costs to have been incurred as a consequence of the multiplication of the proceedings resulting from the unreasonable and vexatious acts.[3/] See e.g., Motion Pictures

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2/ In Triangle Involvement Council v. Ritchie, 402 U.S. 497, 502 (1971), Justice Harlan stated in his concurring opinion that a "changed posture of the case" could preclude its adjudication from being "a provident expenditure of the energies of the Court."

3/ The necessity for showing the existence of each of the four requirements has not always been clearly perceived. See Acevedo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976) (assessment of double costs as excess costs). A more recent decision by the same court attempted to formulate standards applicable to § 1927. The court wrote that

> [I]n an action not itself brought in bad faith, an award of attorneys' fees should

Patents Co. v. Steiner, 301 F. 63, 64-65 (2d Cir. 1912). A finding of liability under § 1927 can therefore only be predicated upon an antecedent finding that each of these criteria is satisfied. In particular, it must be shown that the proceedings have been multiplied and that the multiplication resulted in excess costs being incurred by the opposing party. A mere showing that the attorney acted unreasonably and vexatiously is therefore insufficient to invoke § 1927.[4/]

The alleged vexatious and unreasonable acts committed by respondents' attorneys were described at length by the Court of Appeals.[5/] 599 F.2d at 1380-1381. These acts were termed vexatious by that court as well as by the district court. Like the district court, the Court of Appeals regarded these acts as being vexatious only insofar as they evidenced the failure of respondents' attorneys "to diligently pursue the plaintiffs' interests" and evidenced the cause for the "forced dismissal of the plaintiff's

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3/ cont'd

be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves.

Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977). Whether even this formulation is completely accurate is perhaps doubtful.

4/ A wide range of sanctions are available against an attorney who acts unreasonably and vexatiously. See 7 Am Jur, 2d, Attorneys at Law, §§ 12-43, 167-200; and Comments, Sanctions Imposed By Courts On Attorneys Who Abuse the Judicial Process, 44 Chi. L. Rev. 619 (1977).

5/ Respondents' attorneys were held by the district court to have acted unreasonably and vexatiously because of the following: (1) failure of respondent McPherson to appear for twice scheduled depositions; (2) failure to answer petitioner's interrogatories as ordered; (3) failure of respondents' attorneys to file a brief, as ordered by the district court, within 10 days of April 7, 1976; (4) filing a brief on June 1, 1976, more than ten days following the court's second order of May 19, 1976 to file a brief within ten days (the brief was alleged by the district judge to be inadequate because it "casually mention[ed]" a case which the judge wanted briefed and because it "presented no solid factual basis for distinguishing between that case" and the one before the court. (Ruling upon Motion For Rehearing, dated April 13, 1977); and (5) failure to advise respondents of their denomination as class representatives and of the possible financial consequences of the denomination.

claims."[6/] 599 F.2d at 81. The affirmance by the Court of Appeals of the district court's finding and conclusion that respondents' attorneys acted vexatiously thus reflects the Court of Appeals' view, as well as that of the district court, that respondents' attorneys acted vexatiously only insofar as they failed to prosecute their clients' case and caused the claims of their clients to be dismissed for nonprosecution.

Acts constituting a failure to prosecute are not, with respect to an action dismissed on that ground, cognizable under § 1927. Such acts by definition, do not result in a multiplication of proceedings. Perhaps, the requisite multiplication would have existed had the action not been aborted by respondents' attorneys' conduct. This issue, however, need not be decided since the

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6/ The opinion of the Court of Appeals makes it evident that it, and the district court, considered the failure to file briefs as ordered and the failure to communicate with the named plaintiffs concerning possible class representation as bearing only upon respondents' attorneys' failure to prosecute properly their clients' case. 599 F.2d at 1381.

action was in fact dismissed for nonprosecution. Petitioner benefitted from the dismissal rather than being harmed by it and necessarily, incurred no excess costs from failure to prosecute or dismissal. To reward petitioner with excess costs (irrespective of whether attorney's fees are included in the award) would not be in conformity with the statute but would reward petitioner twice over, once by dismissal of respondents' claims and once by an award of alleged excess costs. The absurdity of such a result is especially egregious since neither the district court nor the Court of Appeals found that respondents or their attorneys had vexatiously commenced the action. Each responsive action taken by petitioner in this lawsuit was triggered by nonfrivolous actions taken by respondents and their attorneys. Consequently, no multiplication of proceeding occurred[7/] and no

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7/ Multiplication of proceedings occurs when a frivolous action is commenced or a frivolous appeal is brought, See e.g. Hanley v. Condrey, 467 F.2d 697 (2d Cir. 1972); Browning Debenture Holders' Committee v. DASA, supra, 560 F.2d at 1088-1089, or when any frivolous action is taken which requires a response by the opposing party or

excess costs were incurred.

In holding that respondents' attorneys acted vexatiously in not prosecuting the underlying Title VII action, both lower courts considered the failure of respondents' attorneys to file a brief and the failure to advise their clients concerning the significance of instituting the action as a class action. The failure to file the required brief clearly did not multiply the proceedings or lead to excess costs. In a similar situation, the Third Circuit held that the failure to file a pretrial memorandum within the time limits did not cause the opposing party to incur excess costs. Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 731, n.1 (3rd Cir. 1962) cert. denied, 371 U.S 888 (1962). Moreover, respondents' attorneys eventually did file a brief. See note 5, supra. In any event, no multiplication of the proceedings resulted from the failure.

7/ contd.
which puts that party to unnecessary expense. See Weiss v. United States, 227 F.2d 72 (2d Cir. 1955), cert. dneied, 359 U.S 936 (1956), rehearing denied 350 U.S. 977; Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908, rehearing denied 395 U.S. 987.

Similarly, no multiplication of the proceedings resulted from the initial effort to bring the action as a class action or from the alleged failure to advise the individual plaintiffs in detail about the significance of the class action. No evidence has been presented showing that a class action was improper or that respondents' attorneys were not initially entitled to rely upon their clients' assertion and belief that other blacks suffered similar racial discrimination at the hands of defendant. See excerpts from respondents' depositions 73 F.R.D. at 414-415, n.2. Moreover, neither the Court of Appeals nor the district court found that the purported effort to bring the action as a class action was frivolous or vexatious.[8/] Apart from the initial designation of the lawsuit as a class action, no attempt was made to seek a determination, pursuant to Rule 23(c) of the Federal Rules of Civil Pro-

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8/ Even if there were a possibility of construing the district court's decision as holding that respondents' attorneys acted vexatiously in attempting to bring the action as a class action, that portion of the district court's decision was not affirmed upon appeal. See the Court of Appeals' opinion at 599 F.2d at 1381.

cedure, that the action could be maintained as a class action.[9/] Finally, the finding that respondents' attorneys had not apprised respondents that costs, including attorney's fees, could conceivably be assesed against them, see Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421-422 (1978), did not demonstrate that respondents' attorneys had caused a multiplication of the proceedings or had caused petitioner to incur excess costs.[10/]

9/ The initial designation by respondents' attorneys of the action as a class action did not necessarily determine the permissible scope of respondents' interrogatories. See, e.g., Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), where the Fourth Circuit stated that prosecution of individual claims of racial discrimination may require examination of "statistics, patterns, practices and general policies to ascertain whether discrimination exists." 457 F.2d at 1382. Accord: Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970); Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 723 (8th Cir. 1973).

10/ In Surowitz v. Hilton Hotels Corp.,383 U.S. 363 (1966), this Court tentatively explored, in the context of a derivative suit under then Rule 23(b), the extent to which an attorney might be required to disclose to the client the nature of the lawsuit and the extent to which the client's

Moreover, the Christiansburg rule is applicable only when the action is frivolous or brought in bad faith.

Since respondents' attorneys' other alleged unreasonable and vexatious acts[11/] did not multiply the proceedings or cause excess costs, § 1927 is inapplicable to the facts of this case and the writ should be dismissed as improvidently granted.

10/ cont'd

ignorance of the circumstances of the lawsuit might, if ever, justify a dismissal of the client's complaint. 383 U.S at 371-374. Apart from stating the necessity for the attorney and the client to act in good faith, this Court only went so far, in the circumstances of that case, as to conclude that a plaintiff seeking to invoke the aid of the judicial process must only "have general knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges." 383 U.S at ft. 5.

11/ The failure of respondent's attorneys to appear at a 10:00 a.m. court meeting on April 21, 1976, was described in the docket sheet of the district court as due to "inadvertence." 73 F.R.D. at 412 (W.D. La. 1977).

Since no evidence was presented below showing that respondents' attorneys were responsible for respondent McPherson's nonattendance at his

The reason for dismissing the writ as improvidently granted is simply put. The decision of the Court of Appeals, while correct in concluding that attorney's fees are not allowable under § 1927, erred in assuming that § 1927 was applicable to respondents' conduct as found by the district court. Dismissal of the writ as improvidently granted would allow this Court to avoid compounding the error.

On the other hand, a failure to dismiss the writ as improvidently granted that is followed by an award of attorney's fees to petitioner, would imply that § 1927 is applicable to conduct consisting of a failure to prosecute. Moreover, it would raise serious questions concerning the scope and the proper application of § 1927. For example, it would raise questions concerning what type of conduct constitutes a multiplication of

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11/ cont'd

scheduled depositions, his failure to appear cannot be used to show that respondents' attorneys multiplied the proceedings. See Thompson v. Louisville, 362 U.S 199 (1960).

proceedings and what type of acts create excess costs. In addition it would invite doubt as to whether there was a need to make an evidentiary showing of a causal connection between the multiplication of the proceedings and the vexatious and unreasonable acts or to make a showing of a causal connection between these acts and the incurrence of excess costs. Finally, it would raise a basic question of whether the existence of excess costs can be inferred solely from the occurrence of vexatious acts.

In view of the confusion which already exists concerning the application of § 1927, see e.g., Hanley v. Condrey, 467 F.2d 697 (2d Cir. 1972); (the need for a hearing); Acevedo v. Immigration and Naturalization Service, supra (whether double costs can be imposed); Wheeler v. Anchor Continental, Inc., 20 F.E.P.C. 591 (D.S.C. 1978), appeal docketed, No. 79-1116 (4th Cir. Feb. 14, 1979) (whether excess costs, including attorney's fees, can be assessed in the midst of trial, whether oral argument satisfies the requirements for an evidentiary hearing, and whether particular

conduct is vexatious), adding another level of confusion might entirely overwhelm the effort to apply § 1927 in accordance with Congressional intent.

Besides these reasons, there is one further reason which requires dismissal of the writ. There is more than a substantial possibility that the district court, acting pursuant to the judgment of the Court of Appeals, will, upon remand, obviate any necessity for deciding the allowability of attorney's fees under § 1927. The likelihood is great since the record shows neither the existence of excess costs nor any multiplication of the proceedings. Given this likelihood, the writ should be dismised as improvidently granted.[12/]

12/ In its remand order, the Court of Appeals below said

> § 1927 provides only for excess costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.

599 F.2d at 1382.

Moreover, the dismissal would be, given the nature of the remand by the Court of Appeals, consistent with this Court's policy of not reviewing nonfinal appellate decisions. See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R., 389 U.S 327 (1967); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S 251, 258 (1916).

If the Court does not dismiss the writ, then it should affirm the judgment of the Court of Appeals remanding the case for an evidentiary hearing on the question whether excess costs were incurred and whether there was a multiplication of proceedings caused by respondents' attorneys' vexatious acts. To the extent, however, that the judgment of the Court of Appeals permits the district court to find that excess costs were created as a result of respondent McPherson's failure to attend his noticed depositions, the judgment should be reversed since no evidence was ever offered showing that any such excess costs, or concomitant multiplication of proceedings, were caused by acts of respondents' attorneys. See Thompson v. Louisville, supra.

II. ATTORNEY'S FEES ARE NOT ALLOWABLE AS ELEMENTS OF COSTS UNDER § 1927

If this Court decides the issue for which it granted certiorari, then the judgment of the Court of Appeals must, on that issue, be affirmed. For the reasons indicated by the Fifth Circuit, attorney's fees are not recoverable under § 1927.[13/] As the Fifth Circuit implicitly recognized, the scope of the meaning of the term "costs" appearing in § 1927 is neither enlarged nor restricted by the types of costs allowable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e-5(k) and under the Civil Rights Attorney's

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13/ No one seriously doubts that, at the time the statute was enacted, it was not contemplated that an award of excess costs under it would include attorney's fees. Clearly the meaning of the term "costs" was limited to what are commonly referred to as taxable costs. 1507 Corporation v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971); United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976). This has been interpreted correctly to require only inclusion of items of "regular costs" as elements of excess costs under § 1927. 1507 Corporation v. Henderson, supra, 447 F.2d at 542. Accord: Kiefel v. Las Vegas Hacienda, Inc., supra, 404 F.2d at 1166, 1170. Since attorney's fees are not items of regular costs under federal costs

Fees Award Act of 1976, 42 U.S.C. § 1988.[14/] No justification exists for believing that the meaning and application of § 1927 should vary

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13/ cont'd

statutes, they have been properly excluded from consideration as items of costs under § 1927. 1507 Corporation v. Henderson, supra, 447 F.2d at 542-43; Kiefel v. Las Vegas Hacienda, Inc., supra, 404 F.2d at 1170.

This conclusion is the only one which is consistent with this Court's decisions in Alyeska Pipeline Serv. v. Wilderness Society, 421 U.S 240 (1975) and Christiansburg Garment Co. v. EEOC, supra. To the extent that contrary decisions have been reached in other cases, they have been reached without analysis of the underlying issues. See e.g., Browning Debenture Holders' Committee v. DASA Corp., supra.

14/ The purposes behind the civil rights statutes and § 1927 are different. The latter is a penal statue, United States v. Ross, supra, 535 F.2d at 350, whereas the civil rights statutes are remedial. See Newman v. Piggie Park Enterprises, 390 U.S 400, 402 (1968); Prandine v. National Tea Co., 585 F.2d 47, 53 (3rd Cir. 1978); Parker v. Califano, 561 F.2d 320, 330-331 (D.C. Cir. 1977). Morever, § 1927, unlike the civil rights statutes, is only concerned with multiplication of proceedings. By contrast, the civil rights statute are, unlike § 1927, only concerned with compensating prevailing parties and with deterring groundless actions.

according to whether the action is commenced under a civil rights statutes or is commenced pursuant to another federal provision.

Moreover, allowance of such a variance in the meaning of the statute would produce an anamoly. It would mean, for example, that the United States would not be able, in a Title VII action, to obtain attorney's fees, as part of its excess costs under § 1927, against a defendant's attorney who committed vexatious acts, no matter how much those acts may have multiplied the proceedings and caused the United States to incur excess costs. This result follows from the fact that Title VII does not authorize the United States to recover attorney's fees. See 42 U.S.C. § 2000e-5(k). Yet, defendant would be permitted to recover, in the reverse situation, attorney's fees as excess costs against attorneys for the United States. This, however, would be an absurdity that would make a mockery of the purposes of § 1927. Thus, the term "costs", as it appears in § 1927, must be interpreted uniformly and made equally applicable to all actions.

Even if this Court were to hold that attorney's fees are recoverable under § 1927, it would not follow therefrom that such fees are automatically to be awarded everytime excess costs are taxed under § 1927. The question of whether attorney's fees should be imposed in a particular case is a separate question from whether regular items of costs, including excess costs, should be imposed in the case. The allowability of attorney's fees is governed by standards that are altogether different from those governing assessment of costs under, for example, 28 U.S.C. § 1920. See e.g., Newman v. Piggie Park Enterprises, supra; Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978); Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). Thus, any reversal of the Fifth Circuit's judgment must include a remand permitting that court an opportunity to fashion standards for the award of attorney's fees under § 1927 and permitting that court, as well as the district court, to determine whether respondents' attorneys' conduct has been,

in light of all of the circumstances, such as to justify the assessment of attorney's fees against them. Moreover, such a remand may be necessary, in any event, to determine whether the judgment of the Fifth Circuit below constituted a finding that respondents' attorneys' conduct was not so vexatious and unreasonable as to require, in this instance, an assessment of attorney's fees against them and in favor of petitioner.

CONCLUSION

For the reasons stated above, this Court should dismiss the writ as improvidently granted, or, in the alternative, to either affirm the judgment below or remand the action for proceedings consistent with principles set forth herein.

Respectfully submitted,

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